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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

ILLINOIS CENTRAL RAILROAD  
COMPANY, a Corporation,  
Petitioner,  
vs.  
WESLEY C. KELLEY,  
Respondent.

No. 819

## PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Missouri and BRIEF IN SUPPORT THEREOF.

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1. Petitioner's right claimed, to wit: Release from all liability because of execution and delivery by respondent of a written unconditional re- lease of his cause of action which had been based on the Act of Congress known as the Fed- eral Employers Liability Act, is a federal right which cannot be defeated by parol evidence of an oral condition not embodied in the release, and which flatly contradicts the express word- ing thereof, wherein it is expressly stated that said release contains "the entire understanding of the parties"; allowing the release to be set aside because of such alleged oral condition denied to petitioner a right arising under said Federal Act .....	13-19

2. The erroneous rulings of both the trial court and of the Supreme Court of Missouri approving remarks of respondent's counsel at the trial which were highly inflammatory and prejudicial to petitioner's defense, and refusing to grant petitioner a new trial on account of such remarks, denied to petitioner a right to have its case fairly tried by a jury uninfluenced by such improper remarks, which right it was entitled to enjoy under the Federal Employers Liability Act .....19-25

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No. ....

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## PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

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To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the United States:

Comes now Illinois Central Railroad Company, a corporation, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the Supreme Court of Missouri, Division No. 1, rendered and entered on the 7th day of December, 1943, in the case there styled Wesley C. Kelley, respondent, versus Illinois Central Railroad Company, a corporation, appellant, being No. 38,672, in which cause said Supreme Court of Missouri affirmed a judgment entered in the Circuit Court of the City of St. Louis, Missouri, in favor of respondent and against your petitioner herein (R. 178). Said judgment of the Supreme Court of Missouri, Division No. 1, became final on the 7th day of February, 1944, when that Court overruled petitioner's motion to transfer said cause to the Supreme Court of Missouri en banc (R. 205).

## **OPINION OF THE COURT BELOW.**

The said opinion of Division No. 1 of the Supreme Court of Missouri, which petitioner here seeks to have reviewed, has not yet been officially reported, but it appears on pages 179 to 195 of the transcript of the printed record filed herewith, and is reported in 177 S. W. (2) 435.

## **SUMMARY STATEMENT OF THE MATTER INVOLVED.**

This suit was instituted by respondent, Wesley C. Kelley, against the petitioner, Illinois Central Railroad Company, in the Circuit Court of the City of St. Louis, Missouri, to recover, under the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-60), damages resulting from injuries sustained by respondent while in the employ of petitioner as a section hand. Respondent alleged he was violently thrown from a trailer attached to a motor car which, while standing still, was struck and overturned by another motor car on the same track; that both of said motor cars and said trailer were in charge of servants other than respondent and that said collision was caused by the negligence of petitioner.

Petitioner, admitting the employment as alleged, the collision, and some injury to respondent, and denying all other allegations of respondent's petition, set up, as one of its defenses (R. pp. 4-9), that respondent on the 27th day of October, 1942, made a compromise settlement with petitioner of his claim, and executed and delivered to petitioner a full and complete release (which specifically provided that it contained "the entire understanding of the parties") (R. 7), whereby, in consideration of the payment of the sum of \$3,500, respondent forever released and discharged petitioner from all damages and causes of action growing out of the injuries sustained by him; that respondent then accepted a draft for \$3,500; that an agree-

ment to pay respondent's attorney's fees was contained in a letter from petitioner's agent which was delivered to respondent simultaneously with his delivery of the release to petitioner, together with a stipulation for dismissal of the case (R. pp. 8-9).

In his reply (R. pp. 9-12), respondent alleged that the release was signed and delivered by him conditionally; that the said letter, draft and stipulation were received by respondent with the understanding that the release was not to take effect unless the settlement was approved by one of his attorneys; that said settlement was not so approved, but was disapproved, and that thereupon respondent returned to petitioner the draft, stipulation and letter.

Respondent offered evidence tending to support the allegations of his petition. Parol evidence also tended to support the allegations of respondent's reply that the settlement was conditioned on his attorney's approval.

Petitioner's evidence showed that there was no condition whatever attached to the signing or delivery of the release, which was in writing and recited that it contained the entire understanding of the parties. A fact issue was presented only if the parol evidence, varying the written release, was admissible.

During his opening statement and likewise during his closing argument respondent's counsel made various statements which were objected to by petitioner.

In his opening statement counsel (R. pp. 19-20) told the jury that after the suit had been instituted the claim agent began paying visits to respondent's home and, over objections, added:

"What I proposed to say was that they knew, as attorneys, that they had no right under the rules of the American Bar Association that govern lawyers throughout the United States, and the rules of the Supreme Court of Missouri to go at any time direct to the client and attempt to negotiate a settlement with him."

(Objection was made to that statement and the Court was asked by counsel for petitioner to tell the jury to disregard it and to strike it from the record. Overruled and exceptions saved.)

There was no evidence whatever that any lawyer attempted to or did negotiate the settlement. Respondent's counsel, in his opening statement of what he expected to prove, referred to remarks which he claimed the evidence would show Heilig (petitioner's claim agent) had made to respondent in negotiating the settlement, to the effect that petitioner was "big and powerful," and to the power and majesty of the railroad (R. 21).

These remarks, though purportedly made to Kelley by Heilig, were never mentioned by Kelley in his testimony. Since they were not followed up by any testimony, it is clear that the references to petitioner as being powerful and to the majesty of the railroad were deliberately intended to influence the jury to the prejudice of petitioner, as they undoubtedly did.

The settlement was made more than a year after the accident, by a claim agent in the presence of respondent's wife and disinterested witnesses.

In his said statement counsel also referred to a woman who had given some information to the claim agent as being a "stool pigeon" (R. pp. 22-23). Referring to the fact that on the day of his visit to respondent's home, after having been there on the preceding evening, the claim agent had been duck hunting in the morning and was still wearing his hunting clothes when he called at plaintiff's home to discuss the settlement again, respondent's counsel said (R. p. 24):

"He was in his hunting clothes; he was hunting ducks or something that had come into season, and he was out after ducks with a gun and out after Kelley with a pen."

Counsel also referred in his closing argument to the acts of the claim agent as "perpetrating the crime" of settlement. Timely objection was sustained to the single statement about perpetrating a crime (R. p. 156).

The trial resulted in a verdict and judgment for \$45,000.00.

Thereafter, an appeal was granted by the Circuit Court to the Supreme Court of Missouri (R. pp. 13-14). Petitioner assigned as error the overruling of its demurrer to the evidence at the close of all the evidence because it appeared from plaintiff's own evidence that a valid written release had been signed and unconditionally delivered by him to petitioner for a valuable consideration; the grossly improper and highly prejudicial remarks of counsel and the excessiveness of the verdict and the judgment.

On December 7, 1943, Division No. 1 of the Supreme Court of Missouri ruled there was evidence to support the submission of the case to the jury on the hypothesis that the respondent had been injured by the negligence of the petitioner as alleged, that the release had been signed and delivered conditionally by respondent as alleged in his reply (though the only evidence tending to prove the condition was parol evidence which contradicted the written release), that his attorney had refused to approve said settlement and therefore the condition on which the release was delivered was not complied with; and held that petitioner was not entitled to a new trial because of any remarks made by counsel.

But the Court held the damages were excessive; that the judgment should be affirmed only on condition that plaintiff enter a remittitur of \$15,000 (R. p. 178). Plaintiff entered such a remittitur and the judgment of the Circuit Court was affirmed (R. p. 196).

Thereafter petitioner duly filed its motion for a rehearing (R. 197). On January 3, 1944, petitioner's motion for a rehearing was, by said Division No. 1 of said Supreme Court, overruled (R. 203).

Thereafter petitioner duly filed its motion to transfer said cause to the Court (the Supreme Court of Missouri) en banc, the highest court of the State of Missouri (R. 203).

Thereafter, on the 7th day of February, 1944, petitioner's said motion to transfer said cause from said Division No. 1 of the Supreme Court of Missouri to the Court en banc was, by Division No. 1 of said Supreme Court, overruled (R. 205). Whereupon said Division No. 1 became and was the highest court in the state in which a decision could be had in said cause. By said order the said judgment of said Division No. 1 of the Supreme Court of Missouri in said cause became final.

The duly certified record, including all the proceedings in said cause in said Circuit Court of the City of St. Louis, Missouri, and in said Division No. 1 of said Supreme Court of Missouri, is filed herewith under separate cover.

### **JURISDICTION OF THIS COURT.**

The jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended and reformulated by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a state in which a decision could be had wherein a title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

In said cause petitioner specifically set up and claimed a right under a statute of the United States, namely, Employers' Liability Act, 45 U. S. C. A., Sec. 51, Act of April 22, 1908, C. 149, Sec. 8, 35 Stat. 65, and under the decisions of this Court construing such act, which right was denied.

### QUESTIONS PRESENTED.

1. The first question presented is whether it was competent for respondent to vary by parol evidence the unconditional written release, which by its express terms contained the entire contract of settlement, i. e., whether it was competent to show by parol evidence that the delivery of the release was conditioned on his attorney's approval. Whether the cause of action under the federal act was released is a question of federal law to be decided by this Court under the terms of the written release. Petitioner contends that parol evidence was incompetent to vary its terms; that the release is good.

2. The second question presented is whether the decision of the Supreme Court of Missouri refusing to grant a new trial on account of the statements of counsel (R. pp. 19, 20, 22, 23, 24, 27, 156) denied to petitioner the right to have a fair trial to which it was entitled under the Federal Employers' Liability Act.

### REASONS FOR ALLOWANCE OF THE WRIT.

1. The Supreme Court of Missouri denied petitioner a right set up and claimed under the Federal Employers' Liability Act, namely, the defense that respondent's cause of action under that act was settled and satisfied, i. e., no longer existed. Conceding that respondent once had a valid right of action under the federal act, it was terminated when he signed and delivered a written release which, by its express terms, contained the "entire understanding" between the parties. Parol evidence to prove that the delivery (which is admitted) was conditional, was incompetent and affords no legal basis for avoiding the defense based on the unconditional release. **There was no competent evidence to make this an issue of fact.**

The validity of this defense is a question arising under a federal statute and the final decision rests with this Court.

2. The Supreme Court of Missouri, Division No. 1, by its said decision and judgment in this cause, also denied petitioner a right specially set up and claimed by it under the Federal Employers' Liability Act, namely the right to have the case fairly tried before a jury without venomous oral charges and comments by respondent's attorney in the presence of the jury.

It is submitted that the ruling of the Supreme Court of Missouri in refusing to grant a new trial on account of any or all such grossly prejudicial remarks conflicts with the rulings of this Court relating to the duty of trial courts to protect defendants in damage suits brought under the Federal Employers' Liability Act from the prejudice which such remarks necessarily create in the minds of the jurors—prejudices which cannot be eradicated by merely sustaining objections or telling the jurors to disregard such remarks.

#### **PRAYER.**

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the Supreme Court of Missouri to the end that the said opinion and judgment of Division No. 1 of said Supreme Court of Missouri in said cause entitled Wesley C. Kelley, Respondent, versus Illinois Central Railroad Company, a corporation, Appellant, No. 38,672, be reviewed by this Court as provided by law, and that, upon such review, said judgment be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

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